Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-In-Billing	)	CG Docket No. 04-208

AT&T CORP. OPPOSITION

Lawrence J. Lafaro
Peter H. Jacoby
Richard Rocchini
Martha Lewis Marcus
AT&T Corp.
Room 3A227
One AT&T Way
Bedminster, NJ 07921
(908) 532-1843

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Pursuant to Section 1.4(b)(2) of the Commission's Rules, 47 C.F.R. § 1.4(b)(2), AT&T Corp. ("AT&T") hereby submits these comments in opposition to the Petition for Declaratory Ruling filed by the National Association of State Utility Consumer Advocates ("NASUCA") in the above-captioned proceeding *("NASUCA Petition")*. [1]

INTRODUCTION AND SUMMARY

NASUCA requests that the Commission issue a declaratory ruling "prohibiting telecommunications carriers from imposing monthly line-item charges, surcharges or other fees on customers' bills, unless such charges have been expressly mandated by a regulatory agency."[2]

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[1] *See* FCC Public Notice, DA 04-1495, rel. May 25, 2004. A summary of the Public Notice was published in the Federal Register on June 14, 2004. *See* 69 Fed. Reg. 33021. *National Association of State Utility Consumer Advocates* (NASUCA) *Petition for Declaratory Ruling Regarding Truth-In-Billing and Billing Format ("NASUCA Petition")*, filed March 30, 2004.

[2] *NASUCA Petition* at 1.

Specifically, NASUCA claims that "carriers' line-item charges are misleading and deceptive in their application, bear no demonstrable relationship to the regulatory costs they purport to recover, and therefore constitute unreasonable and unjust carrier practices and charges."[3] The petition asks the Commission to declare that these practices violate the *TIB Order*[4] and the *Contribution Order,*[5] as well as guidelines adopted by the Commission in its the *Advertising Joint Policy.*[6]

NASUCA's petition is simply a disingenuous attempt to preclude carriers from assessing *any* line-items in their bills to end users. As NASUCA must be well aware, *no* line-item charge currently assessed by carriers satisfies both of the criteria set forth in *NASUCA's Petition.* Under the guise of requesting a declaratory ruling applying settled Commission precedent, NASUCA in fact has requested that the Commission adopt a radical and wholly unjustifiable departure from prior law and regulatory policy governing customer billing – a departure that would seriously damage the interests of both carriers and end users alike. The petition grossly distorts all of the Commission's pronouncements upon which NASUCA relies. Despite NASUCA's claims, *none* of those rulings purports in any way to preclude carriers from billing customers using properly

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[3] *NASUCA Petition* at 42.

[4] *In the Matter of Truth-in-Billing and Billing Format,* CC Docket No. 98-170, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 7492 (rel. May 11, 1999) ("*TIB Order*"). *See also Truth In Billing and Billing Format, Order on Reconsideration,* 15 FCC Rcd 6023 (rel. March 29, 2000), *Errata,* 15 FCC Rcd 16544 (rel. March 31, 2000) ("*TIB Reconsideration Order*"); *Truth In Billing and Billing Format,* 15 FCC Rcd 7549, *Order,* (rel. April 19, 2000) ("*TIB Waiver Order*") (collectively, the "*TIB Orders.*")

[5] *In the Matter of Federal State Joint Board on Universal Service,* CC Docket No. 96-45, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24, 952 (re. Dec. 13, 2002) ("*Contribution Order*").

[6] *In the Matter of Joint FCC/FTC Policy Statement For the Advertising of Dial-Around And Other Long-Distance Services to Consumers,* File No. 00-EB-TCD-1(PS), Policy Statement, 15 FCC Rcd 8654 (rel. Mar. 1, 2000)("*Advertising Joint Policy*").

labeled line-items with appropriate accompanying disclosures in their bills to end users. Indeed, both the *TIB Order* and the *Contribution Order* explicitly contemplate that carriers may use line-items in their customer bills, subject to the disclosure and other requirements prescribed in those rulemakings.[7]

As demonstrated below, the Commission should deny the relief requested in the *NASUCA Petition* because it fails to provide either a legal or factual basis for the Commission to issue a declaratory ruling. The Commission has never prohibited carriers from using line-items in their customer bills, and even were it proper for the Commission to consider such an extreme proposal in the context of this proceeding, there is no legitimate policy basis that could conceivably warrant adopting such a ban. NASUCA's additional claim that AT&T's line-item charges – and, in particular, the Regulatory Assessment Fee ("RAF") – somehow violate the Commission's requirements for customer billing are equally baseless. That line-item charge, which recovers certain expenses that AT&T incurs in connection with regulatory activities and obligations, began to be assessed in July 2003, and AT&T's billing of that charge has at all times been in strict compliance with the mandates of the *TIB Order* and Sections 64.2400-2401 of the Commission's rules, 47 C.F.R. §§ 64.2400-2401, implementing that decision.

BACKGROUND STATEMENT

In April 2003, AT&T began to inform residential customers of AT&T services that AT&T would soon impose a new fee on their bills. Bill messages explaining the new fee to customers

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[7] NASUCA's additional reliance on Sections 201(b) and 202 of the Communications Act, 47 U.S.C. §§ 201(b), 202, is equally unavailing. The Commission rulings cited above, which NASUCA claims compel its requested relief, are premised almost entirely on these same statutory grounds.

appeared on customers' monthly bills, stating that beginning on July 1, 2003, customer bills would include a fee of 99 cents per month to help AT&T recover costs associated with interstate access charges, property taxes and expenses associated with regulatory proceedings and compliance. Customers requiring additional information concerning the new fee were given an "800" number to call and an AT&T web site to visit in which detailed service descriptions appear. The AT&T web site also contains detailed responses to frequently asked questions ("FAQs") concerning the fee.[8]

In July 2003, AT&T imposed a RAF of 99 cents per month on customer bills. The RAF recovers costs associated with interstate access charges, property taxes, regulatory proceedings and regulatory compliance. The fee applies to AT&T residential customers who have selected AT&T as their primary interexchange carrier. AT&T Local customers, customers on the AT&T One Rate Simple Plan and customers on global Military Saver Plus Plans are currently exempt from payment of the RAF. In addition, AT&T assesses the fee only if AT&T interstate and/or international charges appear in the residential portion of the customer's telephone bill.

The RAF appears prominently on residential consumers' bills as follows:

> "Regulatory assessment fee .99
> For an explanation of this fee, please call 1 800 854-9940 or
> visit http://www.consumer.att.com/reg."

AT&T places the RAF in a separate section of the bill, titled "Other Charges and Credits," to make it clear that the RAF is not a mandatory fee imposed by the Commission. Mandatory fees appear in a separate section of the AT&T bill, titled "Taxes and Surcharges." Under a banner

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[8] AT&T's bill messages directed consumers requiring additional information concerning the RAF to call 1-800-854-9940, or visit the AT&T web site at www.att.com/reg to receive responses to frequently asked questions, detailed service descriptions and other information regarding the RAF.

heading, titled "Important information about your telephone service," AT&T bills reprint in full the following message, which appeared in the May, June and July billing messages as well:

> "Beginning on July 1, 2003, your bill will include a 99 cent per month Regulatory Assessment Fee. This fee will help AT&T recover the costs associated with interstate access charges, property taxes, and the expenses associated with regulatory proceedings and compliance. This fee applies for each month in which you have any AT&T charges on your bill. This fee is not a tax or charge required by the government."

In addition, AT&T's FAQs explain that "[t]he Regulatory Assessment Fee will help AT&T recover costs associated with interstate access charges, property taxes and the expenses associated with regulatory proceedings and regulatory compliance. In the competitive environment we are in, we cannot continue to absorb these costs."

I. NASUCA'S PETITION FAILS TO SATISFY THE GOVERNING LEGAL STANDARDS FOR ISSUANCE OF A DECLARATORY RULING.

The Commission has no basis to grant declaratory relief under Section 1.2 because, as shown below, there is no Commission order or rule (and NASUCA cannot point to any) that prohibits imposition of these line-item charges. Section 554(e) of the Administrative Procedure Act ("APA") empowers the Commission to issue a declaratory ruling "to terminate a controversy or remove uncertainty." The Commission rule that authorizes declaratory rulings specifically cites the adjudication provision of the APA as its source of authority.[9] Section 1.2 of the Commission's rules provides that, "[t]he Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty." For the Commission to commence an adjudicative

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[9] *See* 47 C.F.R. § 1.2 (*citing* 5 U.S.C. §554).

proceeding (in the form of a declaratory ruling) its decision must be based upon an existing rule or regulation. *N.L.R.B. v. Bell Aerospace Co.,* 416 U.S. 267, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974); *Chisholm v. FCC,* 538 F.2d 349, 176 U.S.App.D.C. 1 (D.C. Cir. 1976).

NASUCA makes no genuine effort to demonstrate that its petition accords with any legitimate construction of the Commission's prior precedents. Moreover, as AT&T also shows in Parts II through IV below, all of NASUCA's claims about the nature of AT&T's disclosures with respect to the RAF are clearly erroneous.

In these circumstances, a request for a declaratory ruling is procedurally improper. It is well-established that declaratory relief is inappropriate where, as here, there are serious disputes regarding both the applicable law governing the permissibility of line-item charges and the material facts concerning AT&T's RAF.[10] For example, in the *Access Charge Reform Order*, the Commission declined to address a petition for declaratory ruling concerning the duty of interexchange carriers to interconnect with competitive local exchange carriers ("CLECs") because interested parties contested the correct construction of past Commission decisions governing carriers' duty to pay access charges, and because even such fundamental questions as the relative level of the CLECs' access charges was disputed. The Commission instead determined that the appropriate procedural vehicle to address the issue raised in the petition was to conduct a further phase of that rulemaking proceeding, in which those contested legal and factual issues could be

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[10] *See Access Charge Reform*, CC Docket No. 96-262, Fifth Report and Order and Further Notice of Proposed Rulemaking, FCC 96-206 (rel. Aug. 27, 1999) ("*Access Charge Reform Order*"), ¶ 188; *Cascade Utilities*, 8 FCC Rcd 781, 782 (Com. Car. Bur. 1993); *Aeronautical Radio, Inc.*, 5 FCC Rcd 2516 (Co. Car. Bur. 1990); *American Network, Inc.*, 4 FCC Rcd 550, 551 (Com. Car. Bur. 1989).

addressed.[11] Because these same considerations apply with full force here, the Commission should for this reason alone reject NASUCA's petition for a declaratory ruling regarding the permissibility of line-item charges.

Moreover, the Commission in the *TIB Order* adopted "broad binding principles to promote truth-in-billing" requiring that customer bills contain full and non-misleading descriptions and clear and conspicuous disclosures of such fees, in order to facilitate customer inquiries.[12] Having announced these principles, the *TIB Order* then adopted "minimal basic guidelines that explicate carriers' binding obligations pursuant to these broad principles."[13] In so doing, the Commission declined to mandate specific labels or language. Instead, the Commission made clear its preference for general, non-prescriptive guidelines:

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[11] *Id.* ¶ 189. Section 1.401 of the Commission's rules, 47 C.F.R. §1.401(a), provides that "[a]ny interested person may petition for the issuance, amendment or repeal of a rule or regulation." Moreover, for the Commission's rulemaking actions to have validity, interested parties must be given the opportunity to participate through a notice and comment process. *See*, e.g., *American Communications Ass'n v. United States,* 298 F.2d 648 (2d Cir. 1962); *Interstate Broadcasting Co. v. United States,* 286 F. 2d 539 (D.C. Cir. 1960).

[12] *TIB Order,* ¶ 9. The *TIB Order* (¶ 5) adopts three specific truth in-billing principles: "First, that customer bills be clearly organized, clearly identify the service provider, and highlight any new providers; Second, that bills contain full and non-misleading descriptions of charges that appear therein; and Third, that bills contain clear and conspicuous disclosure of any information the consumer may need to make specific inquiries about, or contest charges on the bill."

[13] *TIB Order,* ¶ 5. Under the first of those principles, dealing with the organization of bills, the Commission directed that telephone bills must be clearly organized and include information clearly identifying the service provider associated with each charge. For the second principle, dealing with full and non-misleading billed charges, the Commission adopted three guidelines addressing billing descriptions, "deniable" and "non-deniable" charges, and standardized labels for charges resulting from federal regulatory action. The guidelines implementing the Commission's third principle, dealing with clear and conspicuous disclosure of inquiry contacts, included the provision of toll-free numbers for consumers to contact appropriate customer service representatives. *Id.* See also 47 C.F.R. § 64.2401.

> "Through this Order, we adopt broad, binding principles to promote truth-in-billing, rather than mandate detailed rules that would rigidly govern the details or format of carrier billing practices. . . . We use the terms, principles and guidelines in this Order to distinguish our approach from a more detailed regulatory approach urged by some commenters. That is, we envision that carriers may satisfy these obligations in widely divergent manners that best fit their own specific needs and those of their customers [citations omitted]."[14]

NASUCA suggests that the Commission *should have* adopted more rigid rules or prescribed specific billing formats but failed to follow through.[15] In the *TIB* proceedings, however, the Commission had considered and rejected the prescriptive approach:

> "Our decision to adopt broad, binding principles, rather than detailed comprehensive rules, reflects our recognition that there are typically many ways to convey important information to consumers in a clear and accurate manner. For this reason, we disagree with those commenters who assert that more prescriptive rules are necessary to combat consumer fraud through the use of misleading telephone bills. Instead, our principles provide carriers with flexibility in the manner in which they satisfy their truth-in-billing obligations. ... Our Order permits carriers to render bills using the format of their choice, so long as the bills comply with the implementing guidelines we adopt today."[16]

Thus, in the four years since the *TIB Order* was released, the Commission has considered and *declined* to adopt the more stringent rules and guidelines advocated by NASUCA, state commissions and other parties to the TIB proceedings. NASUCA concedes as much (in a footnote) stating that while the Commission sought comment on the applicability of the TIB rules

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[14] *TIB Order,* ¶ 9.

[15] *NASUCA Petition* at v. ("Unfortunately, the Commission never finalized certain aspects of its 1999 Order.")

[16] *TIB Order,* ¶ 10.

to CMRS providers and specific labels carriers should use for line-item charges in the FNPRM portion of the *TIB Order*, "[T]he Commission has not issued any order regarding this further notice, however, and the docket has been inactive for the past four years."[17] NASUCA chides the Commission for "lack of follow-through in the TIB Docket," and complains that the Commission "never finalized certain aspects of its 1999 Order.[18] In the *TIB Reconsideration Order,* the Commission modified certain subsections of Section 64.201 of the Commission's rules, and clarified others.[19] But the Commission has consistently declined to adopt prescriptive rules or more stringent guidelines in these proceedings.

Nevertheless, in its Petition, NASUCA is asking the Commission to declare that these monthly line-items contained on carriers' monthly bills to consumers are misleading and deceptive, unreasonable, unjust and unlawful in violation of both the *TIB Order* as well as Sections 201 and 202 of the Communications Act of 1934. NASUCA seeks to "prohibit[] carriers from imposing any separate monthly fees, line-items or surcharges unless: (a) such charge is mandated by federal, state or local laws, and (b) the amount of such charge conforms to the amount expressly authorized by federal, state or local governmental authority."[20] As discussed below, NASUCA's demand for more stringent rules for carriers' monthly line-items is contrary to any legal

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[17] *NASUCA Petition* at n.2.

[18] *NASUCA Petition* at v; *see also*11-12.

[19] See *TIB Reconsideration Order,* ¶ ¶ 2-3, 7-9, 11 (clarifying requirements applicable to identification of new service providers, providers of bundled services, carriers' trade names, labeling of charges as deniable, and requiring internet customer inquiry for customers who access bills exclusively by e-mail or Internet.)

[20] *NASUCA Petition* at 68.

requirements and is not supported by any of the Commission's previous orders. Therefore, the Commission should deny *NASUCA's Petition* for declaratory relief.

II. AT&T'S REGULATORY ASSESSMENT FEE COMPLIES WITH THE COMMISSION'S *TIB ORDERS.*

NASUCA would have the Commission believe that charges such as the RAF are prohibited by its rules and policies. There is but one response: wishing cannot make it so. Under the *TIB Order* and related decisions, line-item charges such as AT&T's RAF are not unlawful.

NASUCA claims that while the carriers' monthly line-items differ in terms of what they are called and what the carriers claim to recover through the charges, "all are misleading; some are downright deceptive."[21] Individualized formatting of bills and fact-specific bill descriptions in bill messages are precisely what the Commission had in mind when it determined that it would not prescribe the formats of bills or the descriptive content of bill messages. In the *TIB Orders,* the Commission made it clear that it expected carriers to determine how to comply with its principles and guidelines mandating full and non-misleading disclosure, but would leave it to carriers to develop the formats, labels and language needed to meet its requirements. The Commission has been true to these principles. The more stringent and highly prescriptive rules and guidelines NASUCA wishes for have never been adopted.

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[21] *NASUCA Petition* at vi. This assertion, like NASUCA's other repetitive claims that line-item charges are promoting widespread customer confusion, is pure *ipse dixit*, unsupported even by anecdotal evidence much less the kind of reliable data that would be required as a basis to conclude that line-item charges have had the serious anti-consumer effects that NASUCA ascribes to those fees.

NASUCA fails to demonstrate that AT&T's RAF disclosures in any manner fail to satisfy the mandates of the *TIB Orders,* for the simple reason that it cannot do so. AT&T's billing disclosures meet and, in important respects, exceed the Commission's truth-in billing requirements. NASUCA's description of AT&T's billing disclosures makes this apparent:

> "In April 2003, AT&T began advising its customers that, beginning July 1, 2003, their bills would 'include a [$0.99] per month Regulatory Assessment Fee' that 'applies each month in which [there are] any AT&T charges' on the customer's bill. According to AT&T, the fee helps it to 'recover the following costs: interstate access charges; regulatory compliance and proceedings costs and property taxes.' A disclaimer advises customers that '[t]his fee is not a tax or charge required by the government' and directs customers to the company's toll free customer service telephone number and website for more information.
>
> "AT&T's website contains information regarding the Regulatory Assessment Fee that substantially repeats the information set forth in its bill insert, as well as 'Frequently Asked Questions' ('FAQs') regarding the fee. Among other things, the FAQs include the company's rationale for imposing its Regulatory Assessment Fee. AT&T claims that it is assessing the fee because 'in the competitive environment we are in, we cannot continue to absorb these [access charges, property taxes and expenses associated with regulatory proceedings and compliance].' AT&T FAQs, Q1 (copy attached as Attachment B). AT&T also advises that customers enrolled in its local service plans are not subject to the Regulatory Assessment Fee."[22]

As NASUCA shows, AT&T provided customers with ample notice of the RAF several months in advance of the July 1, 2003 implementation date. Through these notices, AT&T provided full and non-misleading descriptions of charges, and clear and conspicuous disclosure of information that consumers needed to understand the RAF. AT&T also met *and exceeded* the requirements of the *TIB Reconsideration Order* by providing customers the toll free numbers *and*

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[22] *NASUCA Petition* at 12-13, n.25 and Attachments A and B.

the website information needed to make inquiries about or contest charges on their bills, regardless of whether customers receive bills in paper format or electronic format.[23]

NASUCA then suggests that if charges like the RAF pass muster, it is only because the Commission has failed or forgotten to close the "loopholes" it left in its truth-in-billing regulations:

> "Unfortunately, certain loopholes in the Commission's *TIB Order* provide the carriers with ample opportunity to over-recover the costs they ostensibly recover via surcharges. For one thing, the Commission never finalized rules regarding standardized labels, as it indicated it would do. *TIB Order,* ¶ ¶ 55-56. Nor did the Commission require that carrier charges be imposed only when expressly authorized by state or federal regulatory action as in the case of universal service fund assessments, enhanced 911 ('E911') surcharges, federal and state telecommunications taxes and other taxes collected by carriers on behalf of the government. Third, the Commission – in neither the *TIB Order* nor in any of the orders establishing the regulatory programs the costs of which the carriers claim they recover – never required carriers to demonstrate that the monthly charges being imposed bore any relationship to the costs directly incurred as a result of such regulatory programs. As a result, carriers have been given *carte blanche* to create these charges, and recover as much money as they think their customers will bear."[24]

This is just more wishful thinking on NASUCA's part. The *TIB Orders* are not the product of failure or forgetfulness. In the TIB proceeding, the Commission commenced an investigation to look at difficult and unsettled truth-in-billing issues. After careful consideration (and reconsideration), the Commission came to the conclusion that these issues were best addressed

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[23] *TIB Reconsideration Order,* ¶ 11 (requiring carriers to provide e-mail or web site access to their customer service facilities, but only where the customer does not receive a paper copy of the telephone bill.)

[24] *NASUCA Petition* at n.16. *See also, id.* at 59-60 ("Nothing in the Commission's *TIB Order* and *Contribution Order* specifically tells carriers what surcharges they may impose to recover their costs of complying with regulatory action, or how those surcharges should be calculated.")

through broad, non-prescriptive guidelines and principles. In so doing, the Commission neither gave carriers *carte blanche* nor failed to protect the legitimate interests of consumers.

A. AT&T's Bills and Bill Messages Permit Subscribers to Accurately Assess the Contents of the RAF and the Costs Recovered.

NASUCA contends that IXC charges such as AT&T's regulatory assessment fee violate the Commission's first truth-in-billing guideline, which requires services included on a telephone bill to be accompanied by a "brief, clear, plain language description of the services rendered." This description must be:

> "[S]ufficiently clear in presentation and specific enough in content so that customers can accurately assess that the services for which they are billed correspond to those that they have requested and received, and that the costs assessed for those services conform to their understanding of the price charged."[25]

The information provided by AT&T is sufficiently clear and specific in content to allow customers to accurately identify the services for which they are being billed and to permit customers to determine whether the amounts they are being charged conform to the price charged for service. AT&T's bills, bill messages and FAQ's all state that the RAF "will *help* AT&T recover the costs associated with *interstate access charges, property taxes, and the expenses associated with regulatory proceedings and compliance*. This fee applies for each month in which you have any AT&T charges on your bill (emphasis added)." These statements identify each service for which customers are being billed, and make it clear that the RAF recovers some, but not all of the costs incurred by AT&T.

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[25] *TIB Order*, ¶ 38.

NASUCA nevertheless complains "[g]iven the 'grab bag' of putative costs each surcharge purportedly recovers (*e.g.*, property taxes, TRS costs, NANPA costs, access costs, costs of regulatory compliance and proceedings, and others), it is impossible to assess whether IXCs surcharges bear any relationship to the services the carriers' customers are receiving."[26] In the *TIB Order,* however, the Commission declined to require carriers to adopt a particular means of aggregating or disaggregating charges on customer bills, and encouraged industry and consumer groups to consider further whether some categorization and aggregation of charges would be advisable, stating "[o]ur goal is to enable consumers to make comparisons among different service providers in connection with these charges, but we expect that this end will be accomplished through several means."[27] The Commission also declined to require carriers to provide a detailed breakdown of their costs and cost reductions on customer bills, stating "long explanations of a carrier's cost calculations may add complexity to telephone bills, creating confusion that outweighs the benefits of providing such descriptions [citations omitted]."[28] The Commission has thus made clear that as long as consumers are able to understand and compare these charges, competition will ensure that carriers recover them in an appropriate manner.

B. The Commission Has Not Adopted Final Guidelines Regarding Standardized Billing Labels.

NASUCA claims that the IXCs' surcharges fail to meet the Commission's guideline governing standardized billing labels.[29] But as NASUCA candidly concedes, "[a]lthough the

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[26] *NASUCA Petition* at 29.

[27] *TIB Order,* ¶ 55.

[28] *Id.* at ¶ 58 and n.164.

[29] *NASUCA Petition* at 30-31 *citing* the *TIB Order,* ¶ 49.

Commission adopted, as a guideline, the requirement that carriers use standardized labels to refer to certain charges relating to federal regulatory action," in the *TIB Order* the Commission sought comment on specific labels that carriers should be obligated to adopt, and only "tentatively concluded that the labels it described were appropriate for charges related to interstate access, universal service contributions and local number portability."[30] At least equally important, NASUCA conspicuously fails to recognize that its cavil about the appropriate labeling of line-item charges implicitly concedes that carriers are not precluded from using such charges in billing their customers.

In the *TIB Order* (¶54), the Commission adopted the guideline that "line-item charges associated with federal regulatory action should be identified through standard and uniform labels across the industry." The Commission then promised to identify the standardized language to be used in these labels, but only *after* receiving industry recommendations on the subject:

> "In considering which labels would be most accurate, descriptive and consumer-friendly, however, we believe that consumer groups are particularly well suited to assist in the development of the uniform terms. Accordingly, through a further notice in this proceeding, we encourage consumer and industry groups to come together, conduct consumer focus groups, and propose jointly to the Commission standard labels for these line-item charges. We will choose the standard labels based on the suggestions we receive in response to the *Further Notice.*"[31]

The Commission then sought comment "on the specific labels that carriers should adopt", proposed "Long Distance Access" "Federal Universal Service" and "Number Portability", and

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[30] *Id.* at 31 and n.86.

[31] *TIB Order,* ¶ 54.

tentatively concluded that these labels are appropriate.[32] Since then, the Commission has neither adopted these labels nor addressed standardized labels for other charges, such as charges that are *not* mandated by federal regulatory action. Unless and until the Commission adopts final guidelines or rules, carriers are free to continue to use non-standard descriptive labels for their line-item charges, provided that these labels comply with the Commission's general truth-in-billing principles.

C. AT&T's Bills and Bill Messages Make Clear That the RAF is Not Government Mandated.

NASUCA claims "AT&T's 'Regulatory Assessment Fee' creates the impression that it is the result of regulatory action, an impression reinforced by the nature of the costs the fee is intended to recover (*e.g.*, costs of regulatory compliance and property taxes)."[33]

Nothing could be further from the truth. AT&T places the RAF in a separate section of the bill, titled "Other Charges and Credits" to make it clear that the RAF is *not* a mandatory fee imposed by the Commission. Mandatory fees, in contrast, appear in a separate section of the AT&T bill, titled "Taxes and Surcharges." AT&T also states on *every* bill under the RAF line-item that "[t]his fee is not a tax or charge required by the government. It helps AT&T recover expenses, including interstate access charges; property taxes; and costs of regulatory compliance and proceedings." The Commission has made it clear that "we would not consider a description of

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[32] *TIB Order,* ¶ 71 ("We tentatively conclude that such labels will adequately identify the charges and provide consumers with a basis for comparison among carriers, while at the same time be sufficiently succinct such that most carriers will be able to use them without requiring that they modify the field lengths of their current billing systems. We seek comment on these tentative conclusions.")

[33] *NASUCA Petition* at 32. ('Regulatory compliance and proceedings' perforce imply regulation, something only the government does. Similarly, only the government collects property taxes.").

[the] charge as being 'mandated' by the federal government to be accurate" and "to state or imply that the carrier has no choice regarding whether or not such a charge must be included on the bill or the amount of the charge would be misleading."[34] Accordingly, under a banner heading titled "Important information about your telephone service," AT&T provided advance notification of the RAF by clearly stating on its bills:

> "Beginning on July 1, 2003, your bill will include a 99 cent per month Regulatory Assessment Fee. This fee will help AT&T recover the costs associated with interstate access charges, property taxes, and the expenses associated with regulatory proceedings and compliance. This fee applies for each month in which you have any AT&T charges on your bill. *This fee is not a tax or charge required by the government* (emphasis added)."

Similar statements appear in AT&T's FAQ's and toll-free inquiry lines. AT&T's bills and bill messages affirmatively dispel any impression that these charges are mandated by regulatory action. They are neither inaccurate nor misleading, and fully comply with the Commission's truth-in-billing requirements.

D. The RAF is Neither Misleading Nor Deceptive in its Application.

NASUCA asserts that, even if not specifically prohibited by the *TIB Order*, carrier surcharges should be prohibited on grounds that they are misleading and therefore unreasonable and unjust under Sections 201 and 202 of the 1934 Act. NASUCA contends that the surcharges are simply devices designed to increase carriers' revenues without raising their monthly or usage-based rates for the telecommunication services provided.[35] According to NASUCA, the RAF is inherently misleading and deceptive:

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[34] *TIB Order,* ¶ 56 (citing as an example a carrier's universal service charge).

[35] *NASUCA Petition* at 37-38.

> "Take, for example, AT&T's Regulatory Assessment Fee. AT&T has reduced its per minute rates for long distance service over the years, both in response to competition and in response to regulatory directives from state commissions. AT&T generally trumpets these rate reductions to the public and regulatory bodies. What AT&T does not trumpet, however, is the fact that these rate reductions have been offset, at least in part, by the imposition of unavoidable surcharges and fees [citation omitted]."[36]

NASUCA's assertions are wholly unsupported by any evidence regarding the RAF.[37] Moreover, rate reductions to meet competition have no relevance whatsoever to the merits of a truth-in-billing claim. AT&T's willingness to reduce rates to compete for customers is pro-competitive and wholly lawful in any event.

Sections 201 and 202 of the Act provide the underpinnings of the Commission's truth-in-billing rules, but they impose no additional billing disclosure requirements. To the extent NASUCA claims it is "deceptive, misleading and unreasonable" to impose line-items, surcharges and fees on customers that recover "ordinary operating costs under the guise of government-mandated or imposed charges", those claims fall squarely within the purview of the *TIB Orders.* NASUCA further claims that it is unreasonable to impose line-items, surcharges and fees while at the same time advertising low monthly and per minute rates for the telecommunications services offered. As demonstrated above, the disclosure of AT&T's RAF is neither deceptive nor misleading.

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[36] *Id.* at 37.

[37] NASUCA's only citation is a February 3, 2004 article in the *Seattle Post-Intelligencer* referring to a report by Consumer Action suggesting that consumers avoid increases in their basic rates by signing up for special calling plans. *NASUCA Petition* at n.98.

III. AT&T'S REGULATORY ASSESSMENT FEE COMPLIES WITH THE COMMISSION'S *CONTRIBUTION ORDER*.

NASUCA claims the carriers' line-item charges, fees and surcharges also violate the Commission's *Contribution Order.*[38] NASUCA freely admits that in the *Contribution Order*, the Commission gave carriers a "green light" to recover administrative or other costs in separate line-items. NASUCA claims, however, that carriers have construed the *Contribution Order* as a license to violate the Commission's rules by characterizing the administrative and other costs they recover as "regulatory fees."[39]

In the *Contribution Order,* the Commission prohibited carriers from marking-up federal universal service fund ("USF") assessments on end-users above the Commission-authorized assessment factor. However, the Commission acknowledged that carriers might continue to incur some administrative costs associated with the collection of USF charges from end users. Its decision expressly permitted carriers to recover administrative or other costs in customer rates or through other line-items:

> "We conclude that telecommunications carriers may not recover their federal universal service contribution costs through a separate line-item that includes a mark up above the relevant contribution factor. Contributing carriers still will have the flexibility to recover their contribution costs through their end user rates if they so choose and to recover any administrative or other costs they currently recover in a universal service line-item through their customer rates or through another line-item [citation omitted]"[40]

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[38] *NASUCA Petition* at 35 ("[T]he Commission made it clear that it did not believe it 'appropriate for carriers to characterize these administrative and other costs as regulatory fees.' Yet, as NASUCA has amply shown it is *precisely* as 'regulatory fees' that carriers are characterizing their various line-item charges.")

[39] *Id.*; *Contribution Order,* ¶54.

[40] *Contribution Order,* ¶ 40.

NASUCA characterizes the Commission's pronouncements as an "open invitation to carriers to impose new line-items,"[41] but its invective cannot obscure the fact that the *Contribution Order* explicitly permitted carriers to continue to assess line-items, subject to the Commission's limitation on the amount of the USF recovery charge.

The *Contribution Order* simply re-states, in the context of universal service mark-ups, settled law that prohibits carriers from characterizing business costs, administrative costs and regulatory costs incurred in excess of those produced by contribution factors or other such formulas as fees mandated by regulators. It also requires carriers to recover such costs separately from USF contribution recovery charges. The *Contribution Order* does not prohibit AT&T or other IXCs from using the term "regulatory assessment fee" – accompanied by a disclaimer stating that "[t]his fee is not a tax or charge required by the government" – to label costs associated with interstate access charges, property taxes and the expenses associated with regulatory proceedings and regulatory compliance. Nor does it prohibit AT&T from recovering these costs in the RAF.

IV. AT&T'S REGULATORY ASSESSMENT FEE COMPLIES WITH THE *ADVERTISING JOINT POLICY.*

NASUCA claims that the *Advertising Joint Policy* suggests that the carrier line-item charges are misleading or deceptive, and therefore constitute unjust and unreasonable practices under Section 201(b) of the 1934 Act.[42] NASUCA concedes that the *Advertising Joint Policy* concerned advertising *per se* rather than billing practices as such. NASUCA claims, however, that

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[41] *NASUCA Petition* at 9.

[42] *NASUCA Petition* at 39 ("This is made clear by the parallels between the consumer protection concerns expressed in both the *TIB Order* and the *Advertising Joint Policy,* as well as the measures designed to protect consumers in both decisions.").

the same observations and concerns noted by the Commission and the FTC in the *Advertising Joint Policy* should apply in considering what ought to constitute deceptive billing practices.[43]

In the *Advertising Joint Policy,* the Commission stated:

> "[A] deceptive ad is one that contains a misrepresentation or omission that is likely to mislead consumers acting reasonably under the circumstances about a material fact. Material facts are those that are important to a consumer's decision to buy or use a product. Information pertaining to the central characteristics of the product or service is presumed material. The cost of a product or service is an example of an attribute presumed material."[44]

NASUCA claims that the Commission must apply the "net impression" standard set forth in the *Advertising Joint Policy* to determine whether the description of a charge on a customer's bill is "likely to mislead, rather than whether it causes actual deception."[45]

While NASUCA suggests that applying the Commission's "truth-in-advertising" standards to carrier billing practices would be appropriate, the *TIB Orders* strongly suggest that it would not. In the *TIB Order,* the Commission expressly considered and rejected suggestions that it require the use of any additional "safe harbor language" on customer bills, or mandate any additional descriptive language in billing disclosures, giving carriers instead broad discretion to fashion their own descriptions:

> "We are persuaded by the record not to adopt any particular 'safe harbor' language, as set forth in the *Notice,* or to mandate specific disclosures. Rather, we believe carriers should have broad discretion

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[43] *Id.* at 40-41.

[44] *Joint Advertising Policy,* ¶ 5.

[45] *NASUCA Petition* at 41 ("In order to make this determination, the Commission looks to the 'net impression' conveyed to consumers by the ad in question, 'the entire mosaic, rather than each tile separately.' Under this standard, which considers the entire ad, transaction or course of dealing, 'even if the wording of an ad may be literally truthful, the net impression conveyed to consumers may still be misleading.'")

> in fashioning their additional descriptions, provided only that they are factually accurate and non-misleading. For example, for purposes of good customer relations, a carrier may wish to elaborate on the nature and origin of its universal service charge. A full, accurate and non-misleading description of the charge would be fully consistent with our guideline."[46]

The Commission had ample opportunity to apply the standards set forth in the *Advertising Joint Policy* to billing disclosures, but did not do so. The *TIB Reconsideration Order,* released in March 2000, shortly after the issuance of the *Advertising Joint Policy,* makes no mention of applying advertising standards to truth-in-billing issues.

In any event, the standards of full, accurate and non-misleading disclosure set forth in the *TIB Orders* are no less exacting -- and much more to the point -- than the standards set forth in the *Advertising Joint Policy*, and AT&T's RAF meets both standards. Bill messages explaining the RAF to customers appear on customers' monthly bills, stating that customer bills include a fee of 99 cents per month to help AT&T recover costs associated with interstate access charges, property taxes and expenses associated with regulatory proceedings and compliance. Customers requiring additional information concerning the new fee are given an "800" number to call and an AT&T web site to visit in which detailed service descriptions and FAQ's appear. AT&T places the RAF in a separate section, discloses the description prominently, and states conspicuously that the RAF is not a mandatory fee imposed by the Commission. Under either of the "truth-in-billing" or "truth-in-advertising" standards, it is clear that consumers are being affirmatively informed, not deceived or misled, by the RAF.

The "truth-in-advertising approach", under which the Commission would review each bill message to determine whether the "net impression" it creates may be misleading, would invite

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[46] *TIB Order,* ¶ 56.

regulatory intervention of the worst kind. NASUCA concedes that it would be "administratively impossible to look at each carrier, or each carrier's fee, to determine whether the fee is sufficiently and accurately described, whether consumers are adequately informed of the fee, or whether the fee reasonably recovers the costs incurred by the carrier in complying with the regulatory program(s) to which the fee is attributed." It is for this reason that the Commission has a complaint process. If action is required to protect consumers and ensure that the pro-consumer, pro-competitive purposes of the telecommunications laws are met, the best approach is to allow the complaint process to work as it is intended to work, by identifying issues and resolving them on a targeted, case-by-case basis.

CONCLUSION

For the reasons stated above, AT&T respectfully requests that the Commission deny the relief requested in the *NASUCA Petition.*

Respectfully submitted,

AT&T Corp.

/s/ Richard A. Rocchini
Lawrence J. Lafaro
Peter H. Jacoby
Richard A. Rocchini
Martha Lewis Marcus
AT&T Corp.
Room 3A227
One AT&T Way
Bedminster, NJ 07921
(908) 532-1843 (voice)
(908) 532-1218 (fax)

July 14, 2004

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Opposition of AT&T Corp. was served by the noted methods, the 14th day of July 2004 on the following:

/s/ Hagi Asfaw
Hagi Asfaw

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A-325
Washington, D.C. 20554
(By Electronic Filing)

Best Copy and Printing, Inc.
Federal Communications Commission
445 12th Street, S.W.
Room CY-B402
Washington, D.C. 20554
fcc@bcpiweb.com
(By Electronic-Mail)

Kelli Farmer
Policy Division
Consumer & Governmental Affairs Bureau
Federal Communications Commission
445 12th Street, SW
Room 4-C740
Washington, DC 20554
(By Electronic Mail)

Patrick W. Pearlman
Deputy Consumer Advocate
The Public Service Commission of West Virginia
Consumer Advocate Division
723 Kanawha Boulevard, East
Charleston, WV 25301
(By First Class Mail)

David C. Bergmann
Assistant Consumers' Counsel
Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
(By First Class Mail)

NASUCA
8380 Coleville Road, Suite 101
Silver Springs, MD 20910
(By First Class Mail)